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No. 03-710

In the Supreme Court of the United States

GERALD DEVENPECK, ET AL., PETITIONERS

v.

JEROME ANTHONY ALFORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether an arrest is valid under the Fourth Amendment when the grounds given by the arresting officers are later determined to be unfounded, but the facts known to the officers objectively establish probable cause for a different offense, where the second offense is not "closely related" to the stated grounds for the arrest.

2. Whether officers are entitled to qualified immunity for such an arrest when, at the time of the arrest, courts were in conflict over whether, and under what circumstances, a "closely related offense" rule governed the validity of arrests.

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INTEREST OF THE UNITED STATES

This case concerns the law of qualified immunity and the interpretation of the Fourth Amendment right against unreasonable seizures. The United States has a substantial interest in the development of both Fourth Amendment law and principles of qualified immunity. The same principles of qualified immunity that apply in civil actions against state and local officials under 42 U.S.C. 1983 also apply in civil actions against federal personnel under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). And, principles of Fourth Amendment law apply to the United States because of its role in the investigation and prosecution of federal crimes.

STATEMENT

1. On the night of November 22, 1997, Washington State Patrol officer Joi Haner noticed a disabled vehicle on the shoulder of a "dark and deserted" stretch of highway in Kitsap County, Washington. Pet. App. 6a. As he passed the disabled car, Haner saw another car pull in behind it, which he later learned was driven by respondent Jerome Alford. Haner stopped to assist the motorists. As Haner stepped from his vehicle, respondent hurriedly returned to his car. *Id.* at 30a; J.A. 95. Respondent told Haner that the people in the stopped car had a flat tire and needed a flashlight. Respondent then drove off. Pet. App. 6a; J.A. 95.

The occupants of the disabled car told Haner that they thought respondent was a police officer, in part because his car had "wig-wag" headlights, which alternately flash on and off and are commonly used on police vehicles. Washington law prohibits persons other than police officers from operating vehicles equipped with flashing headlights. Pet. App. 30a; Wash. Rev. Code Ann. § 46.37.280(3) (West 2001). The motorists also said that respondent had left his flashlight behind, which Haner thought reflected suspicious haste to leave the scene. Pet. App. 6a; J.A. 96-97. Because Haner was concerned that respondent was pretending to be a police officer to prey on motorists, Haner called his supervisor, petitioner Sergeant Gerald Devenpeck, to alert him and request assistance. J.A. 98-101.

Haner drove off in pursuit of respondent. Once Haner had pulled respondent over, Haner noticed that his license plate was nearly unreadable beneath a darkly tinted cover. Through the car window, Haner observed that respondent had a police-band radio broadcasting police communications, a portable police scanner, and handcuffs. Pet. App. 7a, 30a; J.A. 102-106. Respondent initially told Haner that "he worked for the State Patrol, and then he changed it to [the]

Texas [Highway Patrol], and [then to] the [Puget Sound Naval] [S]hipyard police." J.A. 106. Respondent said that his flashing headlights were part of an alarm system that had just been installed, but he claimed to be unable to activate them at Haner's request. J.A. 107. Haner noticed that in his effort to activate the flashing headlights, respondent had pressed several buttons on his keychain and dashboard, but not a button on the steering column that Haner suspected controlled the lights. J.A. 108.

Devenpeck then arrived and discussed with Haner what had happened. J.A. 110-111. Respondent told Devenpeck that he had previously been cited by the Kitsap County Sheriff for having flashing headlights but that he believed they "were legal because * * * the Kitsap County Sheriff had apologized to him and sent him a letter and * * * the ACLU said he could use them as long as he wasn't impersonating [a police officer]." J.A. 134. Because Devenpeck was suspicious of respondent's claim that the flashing lights were simply a feature of his alarm, he asked respondent to show him the section of the alarm user's manual that would describe "what would happen when you activated the alarm." J.A. 138. Devenpeck then noticed an operating tape recorder concealed beneath a coat on respondent's passenger seat and concluded that respondent had been recording the conversation with the officers. Pet. App. 7a. Devenpeck told respondent that he was under arrest for recording the conversation with the officers without their consent. *Ibid.*; J.A. 145. At the scene, Devenpeck reviewed a copy of the Washington Privacy Act, Wash. Rev. Code Ann. § 9.73.030(1)(b) (West 2003),[1] which provides that, "it shall be unlawful for any individual * * * [to] record any * * * [p]rivate conversation * * * without first obtaining the

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[1] Relevant provisions of the Washington Code are reproduced at Pet. App. 66a-69a.

consent of all the persons engaged in the conversation." See Pet. App. 14a & n.4. Devenpeck's review confirmed his belief that the Act prohibited respondent's actions. *Id.* at 16a; J.A. 142, 144, 152.

Respondent said that, because he had had a similar problem recording a conversation with other police officers, he carried in his glove compartment a copy of a Washington Court of Appeals decision holding that the Privacy Act did not apply to the tape-recording of police officers performing official duties, an apparent reference to *State* v. *Flora*, 845 P.2d 1355 (Wash. Ct. App. 1992). Pet. App. 7a. While conducting an inventory of respondent's car in preparation to impound it, Devenpeck did not find a copy of the *Flora* decision in the glove compartment or elsewhere in the car. J.A. 151. Devenpeck also pressed the button Haner had noticed and activated the flashing headlights. Pet. App. 32a.

While Haner was taking respondent to jail, Devenpeck called Deputy Prosecuting Attorney Mark Lindquist, reported what had happened, and read to him the relevant provision of the Privacy Act. Pet. App. 8a, 18a; J.A. 178. Lindquist told Devenpeck that there was "clearly probable cause" (J.A. 179) to arrest respondent for obstructing an officer (because of respondent's evasiveness in responding to questions and requests), see Wash. Rev. Code Ann. § 9A.76.020 (West 2000 & Supp. 2004), for impersonating an officer (based on the flashing headlights, obscured license plate, handcuffs, and police radio equipment in the car), see *id.* § 9A.60.040, and for violating the Privacy Act. J.A. 177, 180. At booking, respondent also was cited for operating a vehicle equipped with flashing headlights. J.A. 10, 24. See generally Wash. Rev. Code Ann. § 46.37.280(3) (West 2001).

A state court later dismissed both the Privacy Act charge (based on *Flora*, *supra*) and the flashing-headlights charge. J.A. 10, 29.

2. Respondent filed suit in federal district court against the Washington State Patrol, Haner and Devenpeck, and others. See Pet. App. 33a. As relevant here, respondent alleged that Haner and Devenpeck had arrested him without probable cause in violation of his rights under the Fourth and Fourteenth Amendments. See 42 U.S.C. 1983. The defendants moved for summary judgment. The district court dismissed claims against the State Patrol and the other individual defendants, but denied Haner and Devenpeck's motion to dismiss on qualified immunity grounds. Pet. App. 34a-40a. The court concluded that it was clearly established in 1997 that the Privacy Act did "not prohibit taping of the police officers in a situation such as the present one." *Id.* at 39a (citing *Flora*, *supra*). Because the court determined that there was "an issue of fact on whether the officers reasonably believed their conduct was lawful," it denied petitioners summary judgment on the qualified immunity issue. *Id.* at 40a.

At trial, the district court instructed the jury that, at the time of the incident, it was clearly established that the state Privacy Act did not prohibit "tape-record[ing] a police officer in the performance of an official function on a public thoroughfare." J.A. 190, 202 (citing *Flora*, *supra*). The court instructed the jury to consider whether petitioners had probable cause to believe that respondent had committed an offense or reasonably believed that the arrest was lawful. J.A. 188-189. The jury returned a verdict in favor of petitioners, J.A. 207, and the district court denied respondent's motion for a new trial. Pet. App. 25a.

3. A divided panel of the court of appeals reversed. Pet. App. 5a-17a. The court held that "under clearly established [state] law, the conduct for which [respondent] was arrested was not a violation of the Privacy Act," *id.* at 10a, and the court rejected petitioners' argument that the arrest nevertheless was valid under the Fourth Amendment because

there was probable cause to arrest respondent for other offenses. *Ibid.* The court stated that, under Ninth Circuit law, an arrest on a charge not supported by probable cause is still valid if there is "[p]robable cause * * * for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Ibid.* (quoting *Gasho* v. *United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995)). Applying that test, the court held that even if there were probable cause to believe that respondent had impersonated or obstructed a police officer, that "does not cure the lack of probable cause" because those offenses "are not closely related to the crime for which [petitioners] arrested [respondent], nor was the conduct required for impersonation and obstruction similar to the conduct for which [respondent] was arrested: tape recording a traffic stop." *Id.* at 11a.

The court also rejected petitioners' claim that they were entitled to qualified immunity because "a reasonable officer would have believed [respondent] was violating the state privacy law." Pet. App. 11a. The court concluded that, because the Privacy Act prohibited only the recording of a "private conversation," and because *Flora* established that "a traffic stop was not a private encounter," *id.* at 14a, "no reasonable officer could think that [respondent] had recorded a private conversation in violation of the Washington Privacy Act." *Id.* at 15a. The court also rejected the argument that petitioners were immune because they reasonably believed that there was probable cause that respondent had committed other offenses, saying that to accept that argument "would eviscerate * * * the 'closely related offense' doctrine." *Id.* at 13a n.2.

Judge Gould dissented. Pet. App. 17a-22a. He wrote that "[t]he officers * * * provided an example of how a responsible and fair-minded officer should proceed deliberately when

unfamiliar with the law a person is or may be violating." *Id.* at 18a. Judge Gould noted that the "broad literal text of the privacy statute," *id.* at 20a, supported the arrest, because "one might say that two officers talking to a suspect alone in an automobile at roadside on a secluded highway, with no one else present, were engaged in a 'private conversation'" protected by the statute. *Id.* at 19a. He believed that a jury could reasonably find that "the officers who read the literal language of the statute, who were unaware of [the] intermediate appellate court precedent, and who received supportive advice from the * * * prosecuting attorney, had a reasonable belief that [respondent']s conduct violated the Privacy Act." *Ibid.*

SUMMARY OF ARGUMENT

Respondent's arrest did not violate his Fourth Amendment rights, much less any clearly established right. An officer may arrest a suspect without a warrant if "the events leading up to the arrest, * * * viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland* v. *Pringle*, 124 S. Ct. 795, 800 (2003) (internal quotation marks omitted). Because that inquiry turns on an objective assessment of the facts rather than the arresting officers' subjective understanding, an arrest is constitutionally valid if the officers have probable cause to arrest the defendant for any offense, even if it is unrelated to the charge initially articulated by the arresting officer.

The court of appeals held that if a police officer arrests a suspect on a charge that is later determined to be unfounded, the arrest is constitutionally invalid unless the officers have probable cause to believe the defendant committed another offense that is "closely related" to the articulated basis for the arrest. That so-called "closely related offense" doctrine is designed to deter bad-faith arrests, knowingly made without probable cause, by preventing police from justifying

them with post-hoc rationalizations. But such a rule is fundamentally inconsistent with the basic principle that officers' subjective intentions play no role in probable cause analysis. *Whren* v. *United States*, 517 U.S. 806 (1996). It is also inconsistent with the principle that an officer's subjective legal evaluation of a situation is irrelevant to the existence of probable cause. *Florida* v. *Royer*, 460 U.S. 491, 507 (1983) (plurality opinion); *Sibron* v. *New York*, 392 U.S. 40, 66-67 (1968). And it would cause the scope of Fourth Amendment protections to vary depending on the arresting officer's evaluation of circumstances.

The "closely related offense" doctrine also is unworkable because it fails to provide clear guidance to police. It raises difficult questions about the manner in which offenses must be related and how closely related they must be before an arrest will be upheld, making the test difficult to administer and apply predictably. It harms the interests of arrestees, by giving police an incentive to charge every applicable offense to ensure that probable cause exists for at least one of them, or simply to refrain from specifying the basis for the arrest. The "closely related offense" doctrine imposes substantial social costs by requiring the suppression of evidence resulting from arrests for which there was probable cause, but does not yield significant benefits because police already have incentives not to make arrests they believe or know to be invalid in the hope that a basis later will be found to support them. The doctrine is poorly tailored to serve its stated purpose, because it does not deter sham arrests for which the officer does not state the basis for arrest, while at the same time invalidating arrests, such as respondent's, which are made in good faith based upon probable cause.

Even if the Fourth Amendment incorporated a "closely related offense" principle, petitioners would be entitled to qualified immunity on the facts of this case. The evidence at trial, taken in the light most favorable to petitioners, amply

supported a determination that the officers reasonably believed respondent had violated state law by impersonating a police officer and obstructing police, and that those offenses justified arrest. Morever, at the time of arrest, the Ninth Circuit had not clearly established the contours of the "closely related" offense doctrine in a way that made clear that this arrest was unlawful. In particular, the Ninth Circuit had not had occasion to consider whether an arrest for behavior occurring during a police investigation was "closely related" to the underlying conduct that precipitated the investigation, an issue that had divided the courts of appeals. Moreover, although the Ninth Circuit had adopted the "closely related offense" doctrine, other courts, including the Washington Supreme Court, had held that an arrest is valid so long as there is probable cause to believe the suspect had committed *any* offense. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).

ARGUMENT

RESPONDENT'S ARREST DID NOT VIOLATE THE FOURTH AMENDMENT, LET ALONE CLEARLY ESTABLISHED LAW

In evaluating a qualified immunity defense, a court must undertake two distinct inquiries. *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). The court first must decide whether the facts state a violation of a constitutional right. In this case, respondent's arrest complied with the Fourth Amendment, and the Court need not reach the second question. But in the event the Court finds the conduct violated the Constitution, it must then decide whether that right was clearly established "under settled law," *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam), such that "it would be clear to a reasonable officer that his conduct was unlawful in the situa-

tion he confronted." *Saucier*, 533 U.S. at 202. Respondent's effort to obtain money damages fails in this latter respect as well.

I. AN ARREST ON A CHARGE THAT IS LATER FOUND TO BE INVALID IS STILL LAWFUL IF THE POLICE HAD PROBABLE CAUSE TO ARREST THE DEFENDANT FOR A DIFFERENT OFFENSE, EVEN IF THAT OFFENSE IS NOT CLOSELY RELATED TO THE OFFENSE THAT WAS THE ARTICULATED BASIS FOR THE ARREST

The essential requirement of the Fourth Amendment is that searches and seizures be reasonable. See *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990). A law enforcement officer may, consistent with the Fourth Amendment, arrest a suspect without a warrant if the officer has probable cause to believe the suspect has committed an offense. *United States* v. *Watson*, 423 U.S. 411, 418 (1976). "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland* v. *Pringle*, 124 S. Ct. 795, 800 (2003) (quoting *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996)). Because the inquiry turns on an objective assessment of the facts rather than the arresting officers' subjective understanding, an arrest is constitutionally valid if the officers in fact have probable cause to arrest the suspect for an offense, even if the arresting officer cites an unrelated offense as the reason for the arrest. *Lee* v. *Ferraro*, 284 F.3d 1188, 1195-1196 (11th Cir. 2002); *United States* v. *Bookhardt*, 277 F.3d 558, 564 (D.C. Cir. 2002); *Barna* v. *City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994). Contrary to the holding of the court of appeals, there is no Fourth Amendment requirement that the offense for which probable cause exists must

be "closely related" to the ground that the officer invokes in making the arrest.

A. The "Closely Related Offense" Doctrine Conflicts With Basic Fourth Amendment Principles

This Court has repeatedly held that the validity of a search or a seizure under the Fourth Amendment "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," not on the officer's subjective state of mind at the time the actions were taken. *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985) (quoting *Scott* v. *United States*, 436 U.S. 128, 136 (1978)). "With the limited exception of some special needs and administrative search cases, see *Indianapolis* v. *Edmond*, 531 U.S. 32, 45 (2000), 'we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.'" *United States* v. *Knights*, 534 U.S. 112, 122 (2001) (quoting *Whren* v. *United States*, 517 U.S. 806, 813 (1996)). That principle is responsive to Fourth Amendment values, because the legality of a search or seizure ultimately turns on whether the facts known to officers justify a particular intrusion on privacy interests, *i.e.*, "the issue is * * * the objective effect of [the officer's] actions." *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000).

Consistent with that principle, the Court has held in a variety of contexts that officers' motivation, intent, and legal evaluation of circumstances are irrelevant to the inquiry. Those include the scope of a defendant's consent to a search, *Florida* v. *Jimeno*, 500 U.S. 248, 250-252 (1991); the scope of the "plain view" doctrine, *Horton* v. *California*, 496 U.S. 128, 138 (1990); the amount of force that may reasonably be used in making an arrest, *Graham* v. *Connor*, 490 U.S. 386, 397-399 (1989); the scope of a search incident to arrest, *United States* v. *Robinson*, 414 U.S. 218, 236 (1973); the existence of

a Fourth Amendment "seizure," *Macon*, 472 U.S. at 470-471; the reasonableness of efforts to minimize the interception of conversations not covered by a wiretap order, *Scott*, 436 U.S. at 137-138; the reasonableness of an officer's decision to board a vessel for document inspection, *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983); the duration of a traffic stop, *Ohio* v. *Robinette*, 519 U.S. 33, 38-39 (1996); and, significantly here, the basis for a probable-cause traffic stop, *Whren*, 517 U.S. at 813. Accord *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968) (in analyzing the reasonableness of a search or seizure, "it is imperative that the facts be judged against an objective standard; would the facts available to the officer at the moment of the seizure * * * 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"). The Fourth Amendment's focus on objective circumstances promotes important interests in "evenhanded law enforcement," *Horton*, 496 U.S. at 138, by ensuring that its protections do not "vary from place to place and from time to time." *Whren*, 517 U.S. at 815. The "closely related offense" doctrine departs from that bedrock Fourth Amendment rule by seeking to combat perceived bad-faith conduct even if it was objectively justified and by ascribing significance to officers' understanding of the law.

1. The courts that have adopted the "closely related offense" doctrine have stated that it is designed to prevent officers from "justify[ing] what from the outset may have been actually sham or fraudulent arrests on the basis of ex post facto justifications that turn out to be valid." *Vance* v. *Nunnery*, 137 F.3d 270, 275 (5th Cir. 1998); accord *Sheehy* v. *Town of Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999); *Richardson* v. *Bonds*, 860 F.2d 1427, 1431 (7th Cir. 1988). But that rationale is fundamentally inconsistent with the basic principle that "[s]ubjective intentions play no role in ordinary probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813. In *Whren*, this Court held that

police officers' subjective motivation for stopping a car was irrelevant so long as the traffic stop was supported by probable cause to believe the driver had violated the traffic laws. The Court unanimously rejected the view that "an ulterior motive might serve to strip the agents of their legal justification" if probable cause supported their actions. *Id.* at 812. The Court observed that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Ibid.* (quoting *Scott*, 436 U.S. at 138). Accord *Arkansas* v. *Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (extending *Whren*'s holding to custodial arrests). By the same principle, it is irrelevant whether an arresting officer subjectively intended to conduct a fraudulent or sham arrest. Because the legality of an arrest turns on whether "the objective effect of [the officer's] actions" was justified by the facts known to the officers, *Bond*, 529 U.S. at 338 n.2, the officer's subjective intent or bad faith is irrelevant.

The "closely related offense" doctrine does not escape its focus on subjective motivation because its application depends in part on an "objective" fact—the arresting officer's statement of the charge supporting the arrest. In *Whren*, the defendants similarly argued that the validity of a traffic stop should depend on the ostensibly "objective" inquiry into whether "the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the [traffic] stop for the reasons given." 517 U.S. at 814. The Court rejected that proposal, in part because "although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations" because "it is designed to combat nothing other than the perceived 'danger' of the pretextual stop." *Ibid.* The same logic applies here as well. The

"closely related offense" doctrine is, like the standard offered by the defendants in *Whren*, an "attempt to root out [a] subjective vice[] through objective means." *Ibid.* The officers' stated basis for the arrest is relevant only because it provides a point of comparison for offenses later identified to justify the arrest, and the comparison is thought relevant only because the lack of a close relationship between the offenses gives rise to a presumption that the arrest was a sham, undertaken with knowledge that probable cause was lacking. Such indirect means of ferreting out a presumed nefarious subjective intent is contrary to the governing principle that objective facts, not the officer's state of mind, control the validity of the arrest. See *United States* v. *Reed*, 349 F.3d 457, 468 (7th Cir. 2003) (Easterbrook, J., dissenting) ("making [the validity of an arrest] turn on relations among offenses [is] hard to reconcile with the Supreme Court's objective approach").

2. The "closely related offense" doctrine is also impermissibly subjective because it holds that the validity of an arrest turns on the arresting officer's subjective *legal* evaluation of the crimes for which probable cause exists. In *Florida* v. *Royer*, 460 U.S. 491 (1983), the Court held that police officers at an airport had illegally detained a traveler, thus vitiating his purported consent to the search of his luggage. *Id.* at 507-508; *id.* at 509 (Brennan, J., concurring in the result). A plurality of the Court concluded that the officers' restrictions on the suspect's movement were tantamount to arrest, *id.* at 503, and rejected the State's argument that the arrest was supported by probable cause. *Id.* at 507-508. But the plurality took care to note that "the fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause and hence removing any barrier to relying on Royer's consent to search." *Id.* at 507. Thus, an

arrest objectively supported by probable cause may be lawful despite the arresting officer's belief that probable cause is lacking. Cf. *Sibron* v. *New York*, 392 U.S. 40, 66-67 (1968) (upholding search as incident to lawful arrest, even though it was initially justified as a stop-and-frisk).[2]

In keeping with *Royer*, the federal courts of appeals have consistently held that an arresting officer's subjective belief that he did not have probable cause for an arrest or search is irrelevant to probable cause analysis.[3] It would be anomalous if an arrest that in fact was supported by probable cause were valid although officers mistakenly believed they lacked probable cause, but the same arrest would be invalid if officers correctly believed they had probable cause but were mistaken about the grounds for it. There is no basis for concluding that "an erroneous legal characterization by a policeman somehow makes his conduct illegal even though but for that mistake the officer would likely have proceeded

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[2] A number of courts of appeals have reached similar results. See, *e.g.*, *United States* v. *Cervantes*, 19 F.3d 1151, 1153-1154 (7th Cir. 1994) (Posner, J.) (where police claimed search of car was incident to arrest of driver on weapons charge but probable cause for that charge was later found to be lacking, upholding the search because there was probable cause that the car contained drug proceeds); *United States* v. *Bowman*, 907 F.2d 63, 65 (8th Cir. 1990) ("The fact the agents thought they were making an investigatory stop did not foreclose the government from proving probable cause."); *United States* v. *Roy*, 869 F.2d 1427, 1432-1433 (11th Cir.) (holding that search performed as warrantless safety inspection was constitutionally valid because probable cause existed that evidence of crime would be found), cert. denied, 493 U.S. 818 (1989).

[3] See, *e.g.*, *United States* v. *$557,933.89 in U.S. Funds*, 287 F.3d 66, 85 (2d Cir. 2002) ("a search or seizure may be upheld if the facts known to the officer support the requisite level of suspicion even if the officer does not subjectively believe them so to do"); *United States* v. *Santana-Garcia*, 264 F.3d 1188, 1192 (10th Cir. 2001); *United States* v. *Anderson*, 923 F.2d 450, 457 (6th Cir. 1991), cert. denied, 499 U.S. 980 and 500 U.S. 936 (1991).

to the alternative correct legal characterization." 1 Wayne R. LaFave, *Search and Seizure* § 1.4(d), at 114 (3d ed. 1996).

B. The "Closely Related Offense" Doctrine Is Difficult To Administer And Yields Disparate Results

In "implementing [the Fourth Amendment's] command of reasonableness," this Court has emphasized the "essential interest" in adopting "readily administrable rules" that are "sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001). "Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment," and thus "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations." *Ibid.* The "closely related offense" doctrine fails this basic requirement. It is inherently difficult to administer, incapable of predictable application, and has produced widely varying results.

The "closely related offense" doctrine does not specify the manner in which offenses must be related: it is unclear whether the principal focus is the factual relatedness of the conduct supporting the offenses, the legal similarity of the statutory prohibitions defining the offenses, or both.[4] Nor

[4] Compare *Driebel* v. *City of Milwaukee*, 298 F.3d 622, 644 (7th Cir. 2002) (doctrine applies if "the charge can reasonably be based on the same set of facts that g[a]ve rise to the arrest" and alternative charge "would have recommended itself to a reasonable police officer acting in good faith at the time the arrest was made"); *Sheehy* v. *Town of Plymouth*, 191 F.3d 15, 19-20 (1st Cir. 1999) (the two crimes must "relate to the same conduct" and "share similar elements or be directed generally at prohibiting the same type of conduct"); *Avery* v. *King*, 110 F.3d 12, 14 (6th Cir. 1997) (test satisfied if the offenses are "in some fashion related"); *United States* v. *Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971) (same), cert. denied, 406 U.S. 923 (1972).

does the test specify how "closely" related the offenses must be. Although most courts that have adopted the doctrine have said that offenses are "closely related" if they arise out of the "same conduct," *Gasho* v. *United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995), that test leaves questions of how expansively to define the relevant "conduct"—whether it includes only the specific conduct that was the immediate basis for arrest (here, respondent's recording of the conversation with the officers), or whether it includes the entire course of conduct culminating in arrest (here, respondent's suspicious conduct with the disabled motorist, his apparently feigned effort to activate the "wig wag" lights and evasive responses to inquiries, and his recording of the conversations). Tellingly, this Court has rejected both "closely related" offense and "same conduct" tests in the context of other constitutional rights on the grounds that they were unworkable. See *Texas* v. *Cobb*, 532 U.S. 162, 173-174 (2001) (rejecting as "difficult to administer" test that would prohibit officers from discussing with a suspect offenses "closely related to" offenses for which the right to counsel had attached); *United States* v. *Dixon*, 509 U.S. 688, 710 (1993) (overruling "same conduct" test for Double Jeopardy Clause, in part because it had been a "continuing source of confusion"); *id.* at 711 & n.16.

Some court of appeals decisions have required a near-identity between the elements of the crimes to establish relatedness, and demanded that the crime arise from the same discrete act of the defendant supporting the initial charge.[5] Other decisions have concluded that crimes are

[5] See, *e.g.*, *Sheehy* v. *Town of Plymouth*, 191 F.3d 15, 19-20 (1st Cir. 1999) (holding that "assault and battery" charge that officer was investigating at the time of defendant's allegedly disorderly conduct was not "related to" disorderly conduct; "the two crimes must share similar elements or be directed generally at prohibiting the same type of conduct" and "the crime with which the arrestee is charged and the crime offered to

related if they arise from the same general course of conduct.[6] Still other decisions define "relatedness" so broadly that the test is met so long as the later-offered charges are not so "extravagant or novel" that they transparently reflect a post-hoc scouring of the criminal code for an offense that fits the suspect's conduct.[7] Unsurprisingly, then, application of the "closely related offense" doctrine has led to disparate results.[8]

The complexity inherent in the rule undermines important interests in certainty and uniformity. The Fourth Amendment test that is applied in jurisdictions that have rejected

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the court as a justification for the arrest must relate to the same conduct").

[6] See, *e.g.*, *Biddle* v. *Martin*, 992 F.2d 673, 676-677 (7th Cir. 1993) (holding that the charge of "allowing another [person] to operate [the owner's] van in a manner contrary to law" was closely related to "obstructing a police officer" where the officer was investigating the traffic offense at the time of defendant's allegedly obstructive conduct); *Pfannstiel* v. *City of Marion*, 918 F.2d 1178, 1181, 1183 (5th Cir. 1990) (holding that "trespass" and "disorderly conduct" offenses were related where officer was investigating the trespass at the time of the defendant's disorderly conduct); *United States* v. *Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971) (holding that the crime of obtaining property or services by false pretenses was related to the offense of operating an automobile with an improper tag, where the false license plate suggested defendant's fraudulent intent), cert. denied, 406 U.S. 923 (1972).

[7] *Richardson*, 860 F.2d at 1431 (finding offenses related "[s]ince a reasonable police officer would have known of both offenses at issue").

[8] Compare, *e.g.*, *Sheehy*, 191 F.3d at 20 (holding that assault charge that officer was investigating at the time of allegedly disorderly conduct was not "related to" disorderly conduct), with *Biddle*, 992 F.2d at 676-677 (holding that traffic offense was closely related to obstruction offense where the officer was investigating the traffic offense at the time of the allegedly obstructive conduct); *Pfannstiel*, 918 F.2d at 1181, 1183 (holding that "trespass" and "disorderly conduct" offenses were related where officer was investigating the trespass at the time of the defendant's disorderly conduct).

the "closely related offense" doctrine is quite straightforward: an arrest is valid so long as the facts known to the officer at the time of arrest are sufficient to support the finding of probable cause for *an* offense. By contrast, in jurisdictions that follow the "closely related offense" doctrine, courts must determine whether alternative offenses are "closely related" to the original charge under tests that defy easy analysis. That complexity serves no valid Fourth Amendment purpose.

C. The "Closely Related Offense" Doctrine Harms The Interests Of Arrestees

The "closely related offense" doctrine gives law-enforcement officers incentives to modify their behavior in ways that are harmful to potential arrestees in order to avoid the invalidation of arrests and to protect themselves from civil liability. First, it "create[s] an incentive for the police 'to routinely charge every citizen taken into custody with every offense' they can think of, 'in order to increase the chances that at least one charge would survive" and be supported by probable cause. *Bookhardt*, 277 F.3d at 566 (quoting *United States* v. *Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971), cert. denied, 406 U.S. 923 (1972)). A practice of routine overcharging would be needlessly intimidating to arrestees and pointlessly lengthen their arrest records.

Second, the "closely related offense" doctrine gives officers an incentive to "simply remain silent as to the basis for the arrest," *Richardson*, 860 F.2d at 1430, and to wait until the defendant's initial appearance before a magistrate to notify the arrestee about the basis for the arrest. At that point, the officer typically would have the assistance of a prosecutor in drafting a charging document. The Fourth Amendment regulates seizures, not charging decisions. Thus, officers are under no constitutional obligation to inform those who have been arrested of the reason for their

arrest. See, *e.g.*, *Calusinski* v. *Kruger*, 24 F.3d 931, 936 n.6 (7th Cir. 1994) ("at the time of arrest an arrestee does not have a Fourth Amendment or Sixth Amendment right to be informed of the reason for the arrest"); *Williams* v. *Schario*, 93 F.3d 527, 529 (8th Cir. 1996) (per curiam) (same); see generally 3 Wayne R. LaFave, *Search and Seizure* § 5.1(e), at 15 n.197 (3d ed. Supp. 2004). Many jurisdictions (including both Washington and the federal government) do not require officers making warrantless arrests to inform arrestees of the basis for arrest. But see, *e.g.*, Tenn. Code Ann. § 40-7-106 (2003); S.D. Codified Laws § 23A- 3-4 (Michie 1998). A routine practice of officers remaining silent about the reason for an arrest would not benefit arrestees, because it is in their interest to be informed at the time of arrest about the charges against them both to decrease anxiety and to help them decide how to exercise their rights.[9]

D. The "Closely Related Offense" Doctrine Cannot Be Justified As A Deterrent To Sham Or Fraudulent Arrests

The "closely related offense" doctrine potentially imposes substantial social costs without offsetting benefits to the protection of constitutional rights. Under the doctrine, an arrest is unlawful if a police officer relies on a charge for which probable cause is later found to be lacking, even if the

[9] A suspect need not be informed about all possible subjects of questioning in order for the suspect to make a voluntary, knowing, and intelligent waiver of his Fifth Amendment privilege. *Colorado* v. *Spring*, 479 U.S. 564, 577 (1987). But as a practical matter, some courts have said that "keeping a suspect informed of the * * * status of the charges * * * should be encouraged rather than discouraged." *United States* v. *Allen*, 247 F.3d 741, 765 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002), and cert. denied, 539 U.S. 916 (2003); accord *United States* v. *Crisco*, 725 F.2d 1228, 1232 (9th Cir.) (information about charges "contribute[s] to an intelligent exercise of [an arrestee's] judgment"), cert. denied, 466 U.S. 977 (1984).

facts known to the officer established probable cause to believe the person arrested had committed another offense. Although a finding that an arrest is unlawful does not in itself preclude prosecution of the arrestee, it would ordinarily deprive the government of the use at trial of all evidence found to be the fruit of that unlawful arrest, including the defendant's own statements and any physical evidence that resulted from the arrest. See, *e.g.*, *Brown* v. *Illinois*, 422 U.S. 590 (1975). While in some instances the government might nevertheless be able to use the evidence if it could demonstrate that the effect of the illegal arrest was sufficiently attenuated, see *id.* at 603-604, or establish an exception to the exclusionary rule, see, *e.g.*, *Murray* v. *United States*, 487 U.S. 533, 537, 539 (1988); *Nix* v. *Williams*, 467 U.S. 431, 443 (1984), in many instances, the evidence would be inadmissible. The exclusion of such evidence damages the truth-seeking function of trials and creates a serious risk of permitting guilty defendants to go free, undermining "society's compelling interest in finding, convicting, and punishing those who violate the law." *Texas* v. *Cobb*, 532 U.S. at 172.

The need to deter sham or fraudulent arrests does not justify that substantial cost. To begin with, the conduct that the "closely related offense" doctrine is designed to protect against is unlikely to occur. As the author of a leading Fourth Amendment treatise explained:

> Suppression for police reliance on the wrong theory even when there exists an alternative valid theory would prevent unconstitutional [action] only if, absent such an extension of the exclusionary rule, it may be assumed police will conduct arrests and searches on grounds they know or suspect to be insufficient in the hope that their actions will later be upheld on some other grounds of

> which they are presently unaware. That assumption, in my judgment, is fanciful.

1 LaFave, *supra*, § 1.4(d), at 114. There is no basis to believe that police officers will proceed with an arrest although they know probable cause to be lacking based on the speculative possibility that a prosecutor later will be able to discern probable cause for an offense that eluded them. Cf. *Nix* v. *Williams*, 467 U.S. at 445 ("A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered."). Thus, the prospect of the suppression of all evidence resulting from an arrest, as well as "the possibility of departmental discipline and civil liability," *id.* at 446, provide investigators strong incentives, even without the "closely related offense" doctrine, to refrain from arresting persons on grounds they know or suspect to be insufficient.

Even if the "closely related offense" doctrine could be justified as a measure to deter sham arrests, it is poorly tailored to accomplish that goal. To begin with, it provides no deterrence against sham arrests in which the officer does not articulate the reason for arrest. In such a case, there is no basis for saying that the charges ultimately filed against the defendant are insufficiently related to the initial charge.

The rule also sweeps far more broadly than is warranted by its deterrence rationale, invalidating not only arrests made in bad faith without probable cause, but also arrests made in good faith and amply supported by probable cause. It is incorrect to conclude that an officer who arrests a defendant for an offense that later is discovered to be invalid was acting in bad faith, whenever the alternative grounds that objectively support the arrest are not "closely related" to the offense originally charged. "A policeman on the scene cannot be expected to assay the evidence with the technical

precision of a prosecutor drawing an information." *Washington Mobilization Comm.* v. *Cullinane*, 566 F.2d 107, 123 (D.C. Cir. 1977). Thus, in determining what offense to charge, "it is inevitable that law enforcement officials will in some cases * * * mistakenly conclude that probable cause is present." *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987); cf. *Illinois* v. *Gates*, 462 U.S. 213, 234 (1983) (noting that "nonlawyers in the midst and haste of a criminal investigation" will make mistakes). In addition, because criminal conduct is often still under investigation at the time of arrest, it will often be difficult or impossible to know with precision what crime has been committed. See, *e.g.*, 3 LaFave, *supra*, § 5.2(c), at 75 (3d ed. 1996). Faced with a menu of conceivable offenses, well intentioned officers may in good faith select one for which probable cause is lacking. Because strong disincentives already exist for misbehavior, the "closely related offense" doctrine is likely to invalidate more good-faith arrests than sham or fraudulent ones.

This case illustrates the point. There is no suggestion that petitioners' arrest of respondent was a sham or fraud or that petitioners intentionally arrested someone they knew to be innocent of any offense. As Judge Gould observed, "[t]he officers did not arrest [respondent] on a rogue mission, nor motivated by malice, nor on a whim." Pet. App. 18a. Indeed, the majority acknowledged petitioners' "good faith." *Id.* at 13a. Nor is there any indication that the alternative bases offered reflect "*ex post facto* extrapolation" to justify the arrest. As respondent notes (Br. in Opp. 2), Haner followed and stopped respondent's car because he suspected respondent of unlawfully impersonating a police officer, and that was the initial focus of the officers' inquiries after the stop. Pet. App. 6a-7a, 30-31a. When the officers contacted the prosecutor shortly after arresting respondent, they discussed with the prosecutor the existence of probable cause not only for a Privacy Act violation but for police-imper-

sonation and obstruction offenses as well. J.A. 177, 180. Indeed, petitioners cited respondent for unlawfully operating a vehicle with flashing headlights. J.A. 10, 24.

II. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY

Qualified immunity shields a police officer from suit for damages if "a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641). "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Ibid.* Taken in the light most favorable to petitioners, the evidence presented at trial amply supports a determination that petitioners reasonably believed they had probable cause that respondent had committed an offense. In light of that evidence and the clear split of authority about the validity and contours of the "closely related offense" doctrine, respondent's arrest did not violate clearly established law.

To begin with, there was ample evidence that respondent had impersonated a police officer in violation of Wash. Rev. Code Ann. § 9A.60.040 (West 2000 & Supp. 2004). Respondent had pulled in behind a disabled vehicle on a dark and secluded stretch of highway, turned on his flashing headlights, left quickly when a state trooper arrived, falsely told Haner that he had worked in law enforcement (J.A. 106), tried to obscure his license plate, and had a police radio, police scanner, and handcuffs. Pet. App. 6a-7a; *id.* at 17a (Gould, J., dissenting) (respondent's conduct was "ominous to say the least"). There likewise was probable cause to believe respondent had obstructed a law enforcement officer in violation of Wash. Rev. Code Ann. § 9A.76.020 (West 2000 & Supp. 2004). Respondent falsely said that he had worked in

law enforcement, that he had been given permission to "use [flashing headlights] as long as he wasn't impersonating [an officer]," J.A. 134, and that the lights were part of his alarm system, and he pressed various buttons on his keychain and dashboard in a purported effort to activate the lights, while making an apparently conscious effort not to press a particular switch on the steering column that later was found to activate the flashing headlights. Respondent's evasive statements and conduct themselves indicate consciousness of guilt. *United States* v. *Ortiz*, 422 U.S. 891, 897 (1975). The reasonableness of petitioners' conclusion is underscored by the fact that Devenpeck conferred with a prosecuting attorney while respondent was in transit to jail. Cf., *e.g.*, *Kijonka* v. *Seitzinger*, 363 F.3d 645, 648 (7th Cir. 2004) (Posner, J.) ("Consulting a prosecutor * * * goes far to establish qualified immunity.").[10]

The officers could reasonably have believed that the arrest of respondent was valid if they had probable cause to believe respondent had committed any offense and not simply the Privacy Act violation. The Ninth Circuit had not clearly established that the "closely related offense" doctrine would render this arrest unlawful. While the Ninth Circuit

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[10] In addition, there was ample evidence that the officers reasonably believed that respondent violated the state Privacy Act when he recorded his conversation with the officers. As Judge Gould noted in dissent, the "broad literal text of the privacy statute," Pet. App. 20a, which makes it unlawful for "any individual * * * to * * * record any * * * [p]rivate conversation * * * without first obtaining the consent of all the persons engaged in the conversation," Wash. Rev. Code Ann. § 9.73.030(1)(b) (West 2003), facially applied to the officers' conversation at the roadside with respondent. Petitioners acted with reasonable care by reading the relevant statute at the scene, and their ignorance of *Flora*—a decision of the intermediate court of appeals for another division of the state that was not binding on the court of appeals where the arrest occurred, see Pet. App. 20a n.3; see generally *Eriksen* v. *Mobay Corp.*, 41 P.3d 488, 495 (Wash. Ct. App. 2002)—did not render the arrest unreasonable.

previously had stated in a footnote that "[p]robable cause may still exist for a closely related offense, even if that offense was not invoked by the arresting officer, as long as it involves the same conduct for which the suspect was arrested," *Gasho*, 39 F.3d at 1428 n.6, the court did so in the context of two nearly identical crimes (removal of property under the control of the Customs Service and removal of seized property), and so had no occasion to elaborate on the contours of the "closely related offense" doctrine. Thus, it was not clear at the time of the arrest whether the Ninth Circuit would take a narrow view of that doctrine instead of the more expansive interpretation embraced by other courts, which the additional offenses at issue in this case would satisfy. Compare, *e.g.*, *Biddie* v. *Martin*, 992 F.2d 673, 676-677 (7th Cir. 1993) (holding additional offenses proffered by officers to be within "closely related offense" doctrine because they were "neither 'novel' nor 'extravagant'"); *Pfannstiel* v. *City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990); *Atkinson*, 450 F.2d at 838.

In particular, the Ninth Circuit had not had occasion to consider whether an arrest for behavior occurring after a traffic stop was "closely related" to the conduct that precipitated the stop, even if the crimes have different elements. Courts of appeals have reached differing conclusions on the related question of whether disorderly conduct or obstruction charges arising from behavior occurring during police investigation of an offense is "closely related" to the underlying offense, see n.8, *supra*, indicating that the issue is a difficult one. Ninth Circuit law on that issue was not clearly established at the time of the arrest.

Even if the Ninth Circuit case law had been clear, it would not have made *the relevant law* sufficiently clear to deny qualified immunity because the Washington state courts take a different view. It has long been the rule in Washington state courts that an arrest is valid although the

charge stated by police is later determined to be unfounded if there was probable cause at the time of the arrest to believe the defendant had committed other offenses. *E.g.*, *State* v. *Vangen*, 433 P.2d 691, 694 (Wash. 1967); *State* v. *Huff*, 826 P.2d 698, 700 (Wash. Ct. App.) (collecting authorities), review denied, 833 P.2d 387 (Wash. 1992). See also 1 LaFave, *supra*, § 1.4(d), at 112 (noting broader conflict among courts of appeals, and stating that the position that police reliance on an incorrect theory affects the validity of the arrest "appears to be a minority view").

The conflict between Washington state courts and the federal appellate court with jurisdiction over Washington about the interpretation of the Fourth Amendment is the kind of circumstance that led this Court to grant certiorari in order to "clearly establish" what the law is. It is not the kind of circumstance that should lead to liability for an officer who wrongly predicts how the Court will resolve the conflict. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999); accord *Hanlon* v. *Berger*, 526 U.S. 808, 810 (1999) (per curiam) (concluding that officers were entitled to qualified immunity even though Ninth Circuit had anticipated the Court's holding that media ride-alongs violate the Fourth Amendment). There is no basis for "insisting 'that policemen act on necessary spurs of the moment with all the knowledge and acuity of constitutional lawyers.'" 1 LaFave, *supra*, § 1.4(d), at 114 (quoting *State* v. *Romeo*, 203 A.2d 23, 32 (N.J. 1964), cert. denied, 379 U.S. 970 (1965)).

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The court of appeals lost sight of controlling principles of Fourth Amendment and qualified immunity law when it reversed the jury verdict exonerating petitioners from liability. Regardless of whether respondent had violated the

state Privacy Act, the objective circumstances known to the officers plainly established probable cause to believe that he had committed other offenses. No more was necessary to satisfy the Fourth Amendment's basic requirement of reasonableness.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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